PUBLIC PROSECUTOR

v.

SAM HONG CHOY

HIGH COURT MALAYA, JOHOR BAHRU
DATO' MOHD. GHAZALI BIN MOHD. YUSOFF J
[CRIMINAL TRIAL NO. 57-1-92]
5 SEPTEMBER 1995

***CRIMINAL LAW**: Accused charged with offence under s. 3 of the Firearms (Increased Penalties) Act 1971 - Accused apprehended by member of the public (PW9) - Whether accused had committed a scheduled offence - Whether PW9 is a person lawfully empowered to make an arrest - Whether a non-bailable and seizable offence had been committed in the view of PW9 - Whether accused intended to cause death or hurt to PW9 - Whether firearm discharged accidentally.*

***WORDS & PHRASES**: "in his view" - Section 27 Criminal Procedure Code - Meaning of - Whether to be given a liberal interpretation.*

***EVIDENCE**: Witness giving evidence of words spoken by victim of robbery - Whether hearsay evidence - Whether admissible - Whether evidence introduced to establish truth of statements - Whether words spoken were a relevant fact - Consideration of s. 6 of the Evidence Act 1950.*

***EVIDENCE**: Assistant armourer giving evidence of the serviceability of the firearm - Whether an expert witness - Whether requirements of s. 45 Evidence Act 1950 satisfied - Evidence of chemist that spent cartridge and slug were discharged from the same firearm - Whether chemist an expert in ballistics - Effect of lack of qualification or experience of an expert - Whether goes to admissibility of evidence.*

The accused was charged with an offence under s. 3 of the Firearms (Increased Penalties) Act 1971 and with an offence under s. 8 of the Arms Act 1960.

The prosecution alleged that the accused was involved in an armed robbery. The prosecution's key witness, PW9, gave evidence that having heard the sound of gun-fire and someone shouting "Tolong! Kejar perompak!" he saw two men running past him, one of whom was later identified as the accused. PW9 gave chase and in an ensuing struggle with the accused, two shots were fired one of which hit the accused in the stomach.

At the close of the prosecution case Counsel for the accused argued that the prosecution had failed to prove that PW9 was a person lawfully empowered to make an arrest as it had not been shown that a non-bailable and seizable offence had been committed in the view of PW9. Counsel further argued that it had not been proved that at the time of the commission of the scheduled offence the accused discharged a firearm with intent to cause death or hurt to PW9.

The other question that arose for decision was whether the evidence of an assistant armourer as to the serviceability of the revolver and the evidence of the chemist on the ballistic test he conducted on the spent cartridge and the slug that was removed from the accused was admissible and whether their evidence was to be treated as expert evidence.

Held:

[1] From the evidence it is clear that PW9 chased after the accused with the intention of arresting him and that when he caught up with the accused, the accused drew his pistol and consequently there was a struggle. There was a struggle because the accused was resisting his own arrest and this is tantamount to committing a scheduled offence as enumerated in the Schedule to the Firearms (Increased Penalties) Act 1971. It was clear from the evidence given by PW9 that the accused discharged the pistol when he was committing the scheduled offence and the evidence clearly shows that the accused did intend to cause death or hurt to PW9 when he discharged the pistol. In the circumstances, Counsel's contention that the pistol was discharged accidentally cannot hold water and the fact that it was the accused who was hurt in the process was irrelevant.

[2] The words "in his view" appearing in s. 27 of the Criminal Procedure Code must be given a liberal interpretation. When a man is found committing a non-bailable and cognizable offence and then tries to escape, the whole is to be treated as one single transaction and any person who either sees him committing the offence or finds him running immediately after the commission of the offence would be entitled to arrest him.

[3] In the present case the action of the accused in running away was part of the same transaction as the robbery and in the circumstances the commission of the offence was committed within sight of PW9 and hence would fall within the meaning of the words "in his view". The accused was definitely seen in a position which justified PW9 to effect an arrest. The words "in his view" would cover situations as found in the instant case where although the private person did not actually witness the non-bailable and seizable offence being committed, he was certain that those persons running away or trying to escape were the offenders themselves as he was in such close proximity to the scene of the crime. In the circumstances PW9 was entitled to arrest the accused by virtue of s. 27 of the Criminal Procedure Code.

[4] The accused's Counsel's contention that the words "Tolong kejar! Perompak" or words to like effect amounted to hearsay and was therefore inadmissible was without merit. PW9 heard those words being shouted by someone and those words were not directed to him specifically but to those present within the vicinity. In the circumstances the prosecution's intention in introducing that evidence was not to establish the truth of those statements but that they were in fact made. In any event those words were in the nature of an exclamation and was a relevant fact which would be admissible by virtue of s. 6 of the Evidence Act 1950. In the circumstances the words heard by PW9 after the sound of gun-fire was admissible and did not infringe the rule against the inadmissibility of hearsay evidence.

[5] There was nothing complicated in the evidence of PW1 which was merely limited to the serviceability of the pistol, which was a relevant fact. PW1 is an assistant armourer and would be competent to give evidence. Bearing in mind that PW1 never went beyond test-firing to prove serviceability, the evidence which he gave was not of a complex and scientific nature which would require special skills. In so far as the evidence of the chemist, to the effect that from the ballistic test he was of the opinion that the slug recovered from the body of the accused and the spent cartridge recovered from the scene were discharged from the same pistol is concerned, the chemist is competent to give such evidence and the Court is entitled to accept his evidence as the opinion of

an expert on its face value. In any event the lack of qualification or even experience on the part of an expert only affects the weight of the evidence rather than its admissibility.

[6] Considering the totality of the evidence, the accused was not a witness of truth and there was no substance with regard to his claim that it was PW9 who pulled the trigger resulting in the discharge of the pistol or that the pistol was discharged accidentally. There was an overwhelming case against the accused and he had failed to rebut the evidence of the prosecution and has failed to raise a reasonable doubt either as to the truth of the prosecution's case or as to his guilt.

[Accused convicted and sentenced to death].

Cases referred to:
Tan Hoi Hung v. PP [1966] 1 MLJ 288 ***(refd)***
Nazir v. Rex AIR (38) 1951 All 3 (FB) ***(foll)***
Sheo Balak Dusadh v. Emperor (V35) AIR 1948 All 103 ***(foll)***
Abdul Aziz v. Emperor AIR [1933] Part. 508 ***(refd)***
Kartar Singh & Ors v. State AIR [1956] Punj 122 ***(refd)***
Subramaniam v. PP [1956] 22 MLJ 220 ***(foll)***
Ratten v. R [1972] AC 378 ***(refd)***
Junaidi bin Abdullah v. PP [1993] 3 MLJ 217 ***(refd)***

Legislation referred to:
Arms Act 1960, s. 8, (a)
Criminal Procedure Code, ss. 27, 106
Criminal Procedure Code (India), ss. 27, 59
Evidence Act 1950, ss. 6, 27, 45
Firearms (Increased Penalties) Act 1971, ss. 2, 3, 8, 9

Other source referred to:
Halsbury' Laws of England, 2nd Edn., Vol. 9, p. 86

For the public prosecutor - Hanif bin Hassan, DPP
For the accused - R.K. Menon; M/s. R.K. Menon & Co.

JUDGMENT

Mohd. Ghazali Mohd. Yusoff J:

The accused was charged with an offence under s. 3 of the Firearms (Increased Penalties) Act 1971 and an offence under s. 8 of the Arms Act 1960; the charges read as follows:

Pertuduhan pindaan pertama:

Bahawa kamu, pada 23.11.90 jam lebih kurang 3.50 petang, di tempat letak kereta di hadapan Kompleks Tun Abdul Razak bersebelahan Panggong Rex, Jalan Wong Ah Fook, Johor Bahru, di dalam daerah Johor Bahru, di dalam Negeri Johor Darul Ta'zim, pada masa melakukan satu kesalahan berjadual iaitu menghalang tangkapan terhadap kamu telah melepaskan tembakan dari sepucuk pistol ke arah Syed Mohsin bin Syed Sagaf (k/p No. 5372227) dengan niat untuk mendatangkan kematian atau cedera terhadap beliau, oleh yang demikian kamu telah melakukan satu kesalahan di bawah seksyen 3 Akta Senjatapi (Penalti-Penalti Lebih Berat) Akta 37 1971.

Pertuduhan pindaan kedua:

Bahawa kamu pada 23.11.90 jam lebih kurang 3.50 petang, di tempat letak kereta di hadapan Kompleks Tun Abdul Razak bersebelahan Panggong Rex, Jalan Wong Ah Fook, Johor Bahru, di dalam daerah Johor Bahru, di dalam Negeri Johor Darul Ta'zim, telah terdapat di dalam milik kamu, sebutir peluru caliber .32, oleh yang demikian kamu telah melakukan kesalahan yang boleh dihukum di bawah seksyen 8(a) Akta Senjatapi 1960.

The prosecution's case show the following:

On 23 November 1990 at about 3.50 pm, PW9, one Syed Mohsin bin Syed Sagaf, a member of the public, after having parked his car and from the car-park was about to use the side-entrance of a building known as Kompleks Tun Abdul Razak (hereafter referred to as "KOMTAR"), Jalan Wong Ah Fook, Johor Bahru, when heard the sound of gun-fire and someone shouting "Tolong! Kejar perompak!". He then saw two men running past him; one was carrying a plastic bag whilst the other, whom he later identified as the accused, had a pistol in his hand. PW9 chased after both men who had by then crossed Jalan Wong Ah Fook, that is, the road fronting KOMTAR. The man who was carrying the plastic bag managed to get into a taxi which then drove off whilst the accused continued running with PW9 still in hot pursuit. Subsequently the accused ran down a flight of steps leading towards the car-park of a cinema which was within the vicinity.

When PW9 caught up with the accused at the bottom of the steps, he told the accused to stop running; however, the latter turned around and drew his pistol which was then tucked at his waist. In the struggle which ensued PW9 managed to hold the barrel of the pistol with the accused still clutching on to it. During the struggle the pistol was discharged twice and immediately after the second discharge, PW9 heard the accused exclaim "Aiya!" and then fell to the ground; he then noticed that the second discharge had hit the accused in the stomach. PW9 immediately took possession of the pistol and also an empty cartridge which he found on the ground.

Subsequently some security guards from KOMTAR arrived at the scene and carried the accused to KOMTAR where he was later handed over to a police officer, PW13, the investigating officer of the case. The pistol and the empty cartridge which was still in the possession of PW9 was also handed over to PW13. Upon checking the pistol, PW13 found a live bullet in the barrel which was later identified as of type .32 calibre and subsequently re-arrested the accused.

The prosecution's case also show that on that date and about the same time, PW8, one Lee Kiem Hoe who together with a friend, had gone to a bank which was housed within the said KOMTAR to make a withdrawal. After withdrawing a sum of over RM10,000 he left the bank together with his friend but as he was about to leave the said building by its side-entrance which led to the car-park, he was confronted by two men. One of the men pointed a gun at him and then took the said sum of money which he was carrying. The two men then left by the said side-entrance and ran towards the car-park. PW8 then shouted that he has been robbed whilst his friend ran after the two men and managed to retrieve the said sum of money. He also heard the sound of gun-fire whilst he was within the said building. He subsequently saw the two men running from the car-park and crossing the road in front of the said building. He however could not recognise the person who robbed him.

The prosecution also adduced evidence that the said pistol was serviceable. PW15, a surgeon who operated upon the accused on the same day for a gun-shot wound, gave evidence that he retrieved a spent slug from the accused's person during the said operation and handed it over to the police. PW6, a senior chemist from the Chemistry Department, Johor Bahru gave evidence that based upon a ballastic test that he conducted, he was of the opinion that the said slug was discharged from the said pistol.

At the close of the prosecution's case Counsel for the accused submitted that several questions have arisen, namely:

(i) whether a scheduled offence has been committed by the accused;

(ii) whether PW9 is a person lawfully empowered to make an arrest;

(iii) whether a non-bailable and seizable offence has been committed in the view of PW9.

He then referred to s. 3 of the Firearms (Increased Penalties) Act 1971 (hereafter referred to as "the 1971 Act") which reads:

> Any person who at the time of his committing or attempting to commit or abetting the commission of a scheduled offence discharges a firearm with intent to cause death or hurt to any person, shall, notwithstanding that no hurt is caused thereby, be punished with death.

Counsel also referred to s. 2 of the 1971 Act which provides that a "scheduled offence" means "any offence enumerated in the Schedule" and item 3 of the said Schedule reads:

> The preventing or resisting, by any person, of his own arrest or the arrest of another by a police officer or any other person lawfully empowered to make the arrest.

He then referred to s. 27 of the Criminal Procedure Code (hereafter referred to as "the Code") which reads:

> (1) Any private person may arrest any person who, in his view, commits a non-bailable and seizable offence ... and shall without unnecessary delay make over the person so arrested to the nearest police officer or, in the absence of a police officer, take such person to the nearest police station.

Counsel argued that in examination-in-chief, PW9 said he heard some shooting and then heard someone shouting "Tolong! Kejar!", and that when he was being cross-examined, he said he heard someone shouting "Tolong kejar! Perompak!". He contended that what PW9 heard is inadmissible as those words amounted to hearsay. He also argued that PW9 was not lawfully empowered to make the arrest as he did not see a non-bailable and seizable offence being committed.

He then submitted that for an offence under s. 3 of the 1971 Act the prosecution must prove:

(i) the commission of a scheduled offence by the accused; and

(ii) that at the time of the commission of the scheduled offence, the accused discharged a firearm with intent to cause death or hurt to PW9.

Counsel argued that the word "discharge" found in s. 3 of the 1971 Act does not cover an accidental discharge and that intention must be clearly proven. He pointed out that in his evidence, PW9 have stated that the accused had the pistol in his hand all along while he

was running but when he caught up with the accused and told him not to run, the accused turned around and drew his pistol. Counsel argued that if the pistol was in the hand of the accused why was there a need for him to draw the pistol. He pointed out that during the struggle, PW9 said he held the barrel of the pistol with both his hands whilst the accused's hand remain fixed ("tersangkut") to the pistol and that it was clear from this statement that PW9 wanted to seize the pistol but could not do so as the accused's hand was stuck to the pistol. He then insisted that the pistol was discharged accidentally during the struggle between the accused and PW9, that is, there was no intention on the part of the accused to cause death or hurt to PW9.

I cannot see any merit in the above arguments. PW9, when he gave evidence, stated that during the struggle he succeeded in changing the direction the pistol was pointed at away from him which to me would denote that the pistol was pointed at him - when he was being cross-examined he said "Selapas bunyi tembakan kedua dia pun jatuh. Masa itu saya dapat pusingkan hala pistol itu". It is obvious from the evidence of PW9 that during the struggle the accused pointed the pistol at PW9 and that the accused's finger was on the trigger as the pistol was discharged twice. Based upon these facts, I cannot see how Counsel's contention that the pistol was discharged accidentally can hold water - the accused had held on to the pistol after the first discharge and this would mean that he never intended to release the pistol to PW9. To me this cannot at all denote that the accused did not intend to cause death or hurt to PW9. The word "intention" was discussed in *Tan Hoi Hung v. PP* [1966] 1 MLJ 288 at p. 289 where Thomson LP said:

> Here I would quote from the latest edition of *Kenny's Outlines of Criminal Law* (18th Edn., p. 31). The editor refers to *Austin's Jurisprudence* and then says this:
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> > 'Intention' in this sense must be distinguished from 'motive'. 'Intention' indicates that a man is consciously shaping his conduct so as to bring about a certain event; 'motive' indicates the reason why he desires that event and therefore why he pursues his selected course of conduct so as to achieve it.
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> In other words, if a man knowingly does something then not only does he intend to do it but in the absence of anything to the contrary he must be taken to intend the natural and probable consequences. If he fires a pistol he must be taken to have intended to fire it and if the firing causes grievous hurt then he must be taken to have intended that consequence.

In his evidence PW9 stated that he wanted to arrest the accused and hand him over to the police; he said "Saya hendak tangkap orang itu dan serahkan kepada polis". From the evidence it is clear that PW9 chased after the accused with the intention of arresting him and that when he caught up with the accused, the accused drew his pistol and consequently there was struggle. There was a struggle because the accused was resisting his own arrest. That surely is tantamount to committing a scheduled offence as enumerated in the Schedule to the 1971 Act. The evidence given by PW9 shows that the accused had discharged the pistol and that the accused himself was hurt in the process - that end result occurred as a result of PW9 having succeeded in pointing the direction of the pistol away from him. PW9 has stated that there was a lapse of two minutes between the first and second shot. Under such circumstances I cannot see how it can be argued that the accused never had the intention to cause death or hurt to PW9. It is clear that the accused discharged the pistol at the time when he was committing the scheduled offence and it is my finding that the evidence clearly shows that the accused did intend to cause death or hurt to PW9 when he discharged the pistol notwithstanding that PW9 was not hurt. The fact that it was the accused who was hurt in the process is irrelevant.

Another question raised by Counsel is whether PW9 was a person lawfully empowered to make the arrest. Section 2 of the 1971 Act, which has been referred to earlier, provides that a "scheduled offence" means any offence enumerated in the Schedule to the Act and item 3 of that Schedule reads "The ... resisting, by any person, of his own arrest ... by ... any other person lawfully empowered to make the arrest"; in other words, a person commits a scheduled offence if he resists his own arrest by a person lawfully empowered to make the arrest. Was PW9 lawfully empowered to make the arrest? It is my finding that PW9 was empowered as such. Section 27 of the Evidence Act 1950, referred to earlier, provides that any private person may arrest any person who, in his view, commits a non-bailable and seizable offence. PW9 is clearly "a private person", which I would think, means a member of the public or a citizen as opposed to a police officer. The said s. 27 enables a private person to arrest any person in certain circumstances but it is subject to the limitation that the person he wants to arrest has "in his view" committed a non-bailable and seizable offence. A question which has now arisen is what do the words "in his view" mean?

In *Nazir v. Rex* AIR (38) 1951 All 3 (FB) Bind Basni Prasad J, in dealing with the words "in his view" as found in s. 59 of the Indian Criminal Procedure Code which is in *pari materia* with s. 27 of our Code, said (at p. 7):

> Section 59 provides as to when a private person may arrest an offender in the following words:
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> > Any private person may arrest any person who, in his view, commits a non-bailable and cognizable offence, or any proclaimed offender ....

The words "in his view" must be given a liberal interpretation. They mean not only "in his sight" but also "in his presence". A narrow interpretation of these words would greatly defeat the object of this section. Suppose in a winter a person is sleeping inside his room and there is no light in it. A thief makes a hole and tries to enter it. He cannot see the thief; but on hearing the sound he becomes aware of the fact that a thief is breaking the wall. Although he has not actually seen the thief he can arrest him. It would be absurd to hold otherwise. Again suppose a blind woman is sleeping and a thief wants to forcibly remove an ornament from her person. Although she cannot see the thief, there can be no doubt that she can arrest him."

In *Sheo Balak Dusadh v. Emperor* (V35) AIR [1948] All 103 which also, *inter alia*, deals with s. 59 of the Indian Criminal Procedure Code, the facts were that the accused were noticed committing the non-bailable and cognizable offence of house-breaking. The inmates along with some neighbours who arrived on hearing the hue and cry, but who had not actually seen the commission of the offence, chased the accused and in the course of the scuffle in arresting the accused, one of the neighbours who was pursuing them was killed. It was held that the persons who had actually seen the thieves at the back of their house were clearly authorised under s. 59 of the Code to arrest them; Harish Chandra J said (at p. 104):

> (5) Learned Counsel for the Crown, Mr. Chandra Sekhar Saran, has drawn our attention to an English case in (1824-37) 1 Moody's Crown Cases 207. No doubt this is a very old case but it appears that the law in England in regard to arrest by a private individual in a certain class of cases was very much the same as it is in India. A private person was authorised to arrest a prisoner while in the actual commission of the offence. It was, however, held that the actual commission of the offence by the prisoner and his subsequent escape constituted one single transaction. The learned Judge held:

> The conviction was lawful, for, as he was seen in the outhouse, and was taken on fresh pursuit before he had left the neighbourhood, it was the same as if he had been taken in the out-house, or in running away from it, that it was all one transaction.

(6) A perusal of *Halsbury's Laws of England*, 2dn Edn., Vol. 9, p. 86 shows that according to English Law a private person may also arrest without a warrant any one who is his presence commits a breach of the peace and also when the offender escapes immediately after committing the breach and is taken on fresh pursuit which commenced immediately and is continued without a break.

(7) No Indian case has been cited before us upon this point, but the Madras case in *Arumuga Goundan & Ors. v. Crown* AIR 1924 Mad 384 shows that there is a tendency to give the words "in the view" wide interpretation. In that case several persons went to their cocoanut tope in order to see whether any thief of toddy was going on and saw a man standing on the ground with a pot of toddy in his hands and two of his confederates climbing the trees, and arrested the man on the ground. No offence was being actually committed at the time. Krishnan J who decided the case observes:

> The toddy was, in my view, in the process of being taken or removed from the cocoanut tope: the first step in which would be to bring it down from the trees, which the other two persons who were up the trees were trying to do; and the next step would be to carry the toddy away from the tope, which the man standing on the ground was doing, as he was collecting the toddy in a pot in his hands. I think, one should not put too strained a construction on the words 'in his view' and I think the prosecution witnesses were justified in arresting the first accused, as one of the thieves committing theft in their view.

(8) In our opinion, when a man is found committing a non-bailable and cognizable offence and then tries to escape, the whole is to be treated as one single transaction and any person who either sees him committing the offence or finds him running away immediately after the commission of the offence would be entitled to arrest him under s. 59, Criminal Procedure Code.

In *Abdul Aziz v. Emperor* AIR [1933] Part. 508, the Judge said that the words "in his view" means "in his presence" or "within sight of him"; however in *Kartar Singh & Ors v. State* AIR [1956] Punj 122, Bishan Narain J was of the view that a private person has no right to effect an arrest unless the offence was committed "in his presence or sight" and not "in his opinion".

In the instant case was the non-bailable and seizable offence of robbery committed by the accused committed "in the presence" or "within sight" of PW9 or was PW9 merely of the "opinion" that such an offence has been committed by the accused? I would tend to agree with the *dicta* in *Nazir v. Rex* (referred to above) that the words "in his view" must be given a liberal interpretation and I would also tend to agree with the views of Harish Chandra J in *Sheo Balak Dusadh v. Emperor* (referred to above) that when a man is found committing a non-bailable and cognizable offence and then tries to escape, the whole is to be treated as one single transaction and any person who either sees him committing the offence or finds him running immediately after the commission of the offence would be entitled to arrest him.

PW9 said that when he was walking towards the side-entrance to KOMTAR he heard the sound of gun-fire and then heard someone shouting "Tolong! Kejar perompak!" Almost instantaneously, two men ran past him - one was carrying a plastic bag and another was carrying a gun. It was clear to him that they were the robbers and that they were running

away. They were running away in his presence and within sight of him and his immediate reaction was to chase after them. He was certain that they had committed robbery when armed which is an arrestable and non-bailable offence as one of them was brandishing a pistol and he did not hesitate to chase them with the intention to arrest them. He was not chasing them because he was of the opinion that they had committed an offence of robbery - he was certain that they had committed such an offence as he heard the sound of gun-fire and heard cries for help to chase the robbers and immediately saw two persons, one of whom was armed, running past him. Under such circumstances, I would treat the whole episode as one single transaction and hence treat the action of the accused in running away as part of that transaction and hold that the commission of the offence was committed within sight of PW9 and hence would fall within the meaning of the words "in his view" and accordingly hold that PW9 was entitled to arrest the accused by virtue of s. 27 of the Code. The accused was definitely seen in a position which justified PW9 to effect an arrest. The persuasive authorities referred to above discussed that the words "in his view" can mean "in his presence" or "within his sight" which means the Courts would interpret those words as going beyond mere opinion. In my view, those words would cover situations as found in the instant case where although the private person did not actually witness the non-bailable and seizable offence being committed, he was certain that those persons running away or trying to escape were the offenders themselves as he was in such close proximity to the scene of the crime.

The words "in his view" can also be found in s. 106 of the Code which reads:

> A police officer may of his own authority interpose to prevent any injury attempted to be committed in his view to any public property, movable or immovable, or the removal or injury of any public land mark or buoy or other water mark used for navigation.

In that section I would think that the words "in his view" would also mean going beyond mere opinion; that section empowers a police officer to interpose where he perceives that a person's action may result in an injury to public property although at the time that he interposes the offence has yet to be committed but there are acts being perpetrated by that person which would seem as being attempts to injure public property. Whether that person's actions amount to such attempts in the view of the police officer would be subjective and is a question of fact dependent upon all the circumstances of the case. Similarly, I would think that whether a non-bailable and seizable offence is being committed or have been committed in the view of a private person is also a question of fact dependent upon all the circumstances of the case.

Another bone of contention raised by Counsel is that the words "Minta tolong! Kejar" or "Tolong kejar! Perompak" amounts to hearsay evidence and is therefore inadmissible. With respect I cannot see any merit in such a contention. I do not think the prosecution's intention in introducing such evidence was to establish the truth of those statements. PW9 heard those words being shouted by someone and those words were not directed to him specifically but to those present within the vicinity. He heard those words and gave evidence that those words were uttered by someone; I do not think that the prosecution introduced that evidence to establish the truth of what was contained in those words. In *Subramaniam v. PP* [1956] 22 MLJ 220, the Privy Council said (at p. 222):

> Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made.

PW9 related what he had heard when he was about to enter the said building. Those words were in the nature of an exclamation and was a relevant fact and would definitely be admissible by virtue of s. 6 of the Evidence Act which reads:

> Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction are relevant, whether they occurred at the same time and place or at different times and places.

Illustrations

> (a) A. is accused of the murder of B. by beating him. Whatever was said or done by A. or B. or the bystanders at the beating or so shortly before or after it as to form part of the transaction is a relevant fact.

As has been said by Lord Wilberforce in *Ratten v. R* [1972] AC 378 (at p. 387):

> The mere fact that evidence of a witness includes evidence as to words spoken by another person who is not called is no objection to its admissibility. Words spoken are facts just as much as any other action by a human being. If the speaking of the words is a relevant fact, a witness may give evidence that they were spoken. A question of hearsay only arises when the words spoken are relied on 'testimonially', that is, as establishing some fact narrated by the words.

Based upon the above, I find that those words that PW9 heard after hearing the sound of gun-fire is admissible and does not infringe the rule against the inadmissibility of hearsay evidence.

Counsel has also questioned the acceptability of the evidence of PW1, a police officer who was attached to the armoury at the police headquarters in Johor Bahru as assistant armourer. He questioned whether PW1 gave evidence as an expert under s. 45 of the Evidence Act and that if s. 45 was not invoked, the evidence of PW1 cannot be accepted as that of an expert. Section 45 of the Evidence Act reads:

> (1) When the Court has to form an opinion upon a point of foreign law or of science or art, or as to identity or genuineness of handwriting or finger impressions, the opinions upon that point of persons specially skilled in that foreign law, science or art, or in questions as to identity or genuineness of handwriting or finger impressions, are relevant facts."
>
> (2) Such persons are called experts.

PW1, who holds the rank of Chief Inspector of Police, stated that prior to the instant case he had given evidence in Court in cases involving firearms. On 31 July 1995 acting upon instructions he conducted a test on the serviceability of the said pistol and subsequently prepared a report. He gave evidence that the pistol was serviceable - its mechanism was intact and in working condition and it could discharge bullets. To me there is nothing complicated in the evidence of PW1 - it was merely limited to the serviceability of the pistol. He is an assistant armourer and would surely be competent to give evidence. Furthermore the evidence which he gave was not of a complex and scientific nature which would require special skills. Looking at his evidence I find that he does possess a particular skill with regard to firearms and its serviceability - he never went beyond mere test-firing, and it is a relevant fact that the pistol was serviceable. It must also be noted that Counsel is not challenging the serviceability of the pistol but is only questioning the competency of PW1. In *Junaidi bin Abdullah v. PP* [1993] 3 MLJ 217 at p. 229, with regard to the test to be applied for the purpose of s. 45 of the Evidence Act, Mohamed Azmi SCJ said:

> First, does the nature of the evidence require special skill? Second, if so, has the witness acquired the necessary skill either by academic qualification or experience so that he has adequate knowledge to express an opinion on the matter under enquiry? The answer to both questions must necessarily depend on the facts of each particular case. The speciality of the skill required of an expert under s. 45 would depend on the scientific nature and the complexity of the evidence sought to be proved. The more scientific and complex the subject matter, the more extensive and deeper will the Court be required to enquire into the ascertainment of his qualification or experience in the particular field of art, trade or profession. But in the final analysis in a non-jury trial, it is for the trial Judge himself as both Judge of fact and law to determine the weight to be attached to such evidence notwithstanding the outstanding qualifications or experience (or the lack of it) of the expert.

Counsel also questioned the competency of PW6, a senior chemist from the Chemistry Department, Johor Bahru who gave evidence that on the request of the police he conducted a ballistic test and that in his opinion the slug which was recovered by PW15, the surgeon, from the body of the accused when the latter was being operated upon and the spent cartridge which PW9 recovered from the scene were discharged from the same pistol. PW6's evidence was also not challenged by the defence. In my view, based upon the evidence of PW9 and PW15, it is clear that the accused did suffer a gun-shot wound from the pistol which he was holding. After conducting an evaluation of PW6's evidence, I am of the view that he was competent enough to give such evidence and that this Court is entitled to accept his evidence as the opinion of an expert on its face value. After all, the issue in the instant case is whether at the time of committing the scheduled offence the accused has discharged the pistol and not as to whether he was wounded by the said pistol. The fact that a slug was recovered from the accused's body corroborates PW9's testimony that the said pistol was discharged during the struggle and that the second discharge wounded the accused.

PW6 has given evidence that after he test-fired the pistol, he conducted a comparison study on the slug and the spent cartridge which the police handed to him with the slug and spent cartridge which were the products of his test-firing with the aid of a comparison microscope and in his evidence said:

> Kemudian saya jalankan perbandingan dari garisan-garisan halus (fine marks) daripada dasar kelongsong peluru (base of cartridge) bertanda 'P' dengan kelongsong peluru yang ditembak, iaitu 'T1' dan saya dapati garisan-garisan tersebut bersepadan (correlate) antara satu sama lain, atau, 'correlation of fine marks'.
>
> Saya juga dapati garisan-garisan halus kepada kepala peluru 'expanded' 'Q' bersepadan dengan garisan-garisan halus pada kepala peluru dari ujian tembak, iaitu, 'T2'.
>
> Berdasarkan keputusan perbandingan tersebut saya berpendapat kelongsong peluru 'expanded' bertanda 'P' dan kepala peluru 'expanded' bertanda 'Q' di dalam sampul surat 'A1' telah ditembak dari pistol dalam sampul bertanda 'A'.

In cross-examination PW6 gave evidence that in earlier cases when he conducted similar tests, he had taken photographs which show the fine lines of the slug or spent cartridge but that it is now no longer the practice of the Chemistry Department to take such photographs. As stated earlier, PW6's competence and also his testimony was not challenged by Counsel and he only made it an issue during his submission at the close of the prosecution's case. Counsel is not even disputing that the accused was wounded by that pistol. Be that as it may, the lack of qualification or even experience on the part of an expert only affects the weight of the evidence rather than admissibility. Under the circumstances, I am satisfied from the evidence of PW6 that he had conducted similar test prior to the instant case and that he

was fully competent and possessed adequate knowledge on the subject. His evidence also confirms PW1's testimony that the pistol was serviceable. The matter is uncomplicated and I cannot see why his evidence cannot be accepted.

With regard to the pistol itself, I find that based upon the totality of the evidence, the pistol recovered from the accused is a "firearm" as defined in s. 2 of the 1971 Act which provides that it means "any lethal barrelled weapon of any description from which any shot, bullet or other missile can be discharged by means of an explosive charge, and includes a bomb or grenade containing an explosive charge".

Finally, Counsel argued that in his evidence, PW13, the investigation officer of the case, stated that the serial number of the pistol is '75995' whereas both PW1, the assistant armourer and PW6, the chemist, gave evidence that the serial number is '575995'. He submitted that this discrepancy is fatal. With respect, the evidence given by PW1, PW6 and PW13 clearly show that the said pistol was not very well maintained and that it was rusty. PW1 gave evidence that he was of the opinion that the pistol was manufactured sometime in 1950. PW6 stated that he had a problem in reading its serial number and had to use a magnifying glass and oblique lighting and also diluted acid before he could read the serial number; he had difficulty in reading the number with the naked eye. PW13 however had noted down the serial number of the pistol without any scientific aid when he received it from PW9 and immediately recorded it in his diary which appeared as item No. 3; this denotes that he recorded the serial number at the outset of his investigation. I am of the view that without proper optical aid, he was not able to notice the first figure with his naked eye although he has managed to read the rest of the figures correctly. He has also identified the pistol based upon its other features. Under the circumstances, I cannot see how this discrepancy, if at all it is one, can be fatal as suggested by Counsel.

At the close of the prosecution's case and after conducting a maximum evaluation of the evidence before me, I was satisfied that the prosecution have tendered sufficient evidence, which if unrebutted, would warrant a conviction, namely:

(i) that the accused was committing a scheduled offence, namely, he was resisting his own arrest;

(ii) that PW9 is a person lawfully empowered to make the arrest;

(iii) that at the time of committing the scheduled offence, the accused discharged a firearm with the intention to cause death or hurt to PW9; and

(iv) that on the same day in question, the accused had in his possession ammunition, namely, a bullet of type .32 calibre,

and having found that the prosecution have established the charges against the accused beyond all reasonable doubt, I thereupon called the accused to enter upon his defence.

The accused elected to give evidence on oath. He claimed that prior to his arrest he was working in Singapore as a construction worker and was staying in a rented room in a flat. He rented the room from a person by the name of Ah Meng and that he used to come to Johor Bahru together with Ah Meng. On one of these trips across the causeway, he was introduced to two of Ah Meng's friends, namely, one Wong Peng Seong and one Sek Chee

Seng. He became acquainted with these two person two or three months prior to his arrest. The accused claimed that he does a bit of sub-contract work and that he informed both Wong and Sek that he was very keen on becoming a sub-contractor.

He stated that on 20 November 1990 while he was at the flat, he received a telephone call from Wong at about 1.00 pm. Wong told him to come to Johor Bahru that night to discuss about some construction and/or renovation work that he wanted to pass on to him. On that night he met Wong and Sek at about 9.00 pm at their usual rendevous, namely, a coffee shop which was about two doors away from a Hotel Sentosa. That same night, Wong brought him to Hotel Sentosa where he checked into a room which was paid for by Wong. He was then informed by Wong that the latter's employer could not meet him that night and that he (Wong) will discuss with his employer about the said work on 23 November 1990.

Wong did not contact him on 21 or 22 November 1990 neither did he meet Sek on those dates. Consequently on 23 November 1990 Wong and Sek came to his room at the said hotel at about 2.00 pm and he was then informed by Wong that the latter's employer was now in KOMTAR and was waiting for them there. He and Wong then went to KOMTAR in Wong's car while Sek went there on his motor-cycle. On arrival, Wong brought him to the outside of a bank which was situated within KOMTAR; Wong was holding a plastic bag. Wong then brought both Sek and him to a nearby toilet and took out two pistols from the plastic bag and informed him that the reason they are there is because he (Wong) wants to rob his employer and upon hearing this, he became scared. He then informed Wong that he did not wish to participate in the robbery but was threatened by Wong who said that his (the accused) responsibility was only to take the money. Although he protested, he was afraid that Wong might shoot him although Wong did not actually say so. Consequently Wong handed a pistol each to Sek and him and he tucked it at his waist underneath his shirt. Wong then gave instructions that his job was only to take the money and follow Sek wherever he went.

He then saw two men entering the building from its side-entrance and then entering the bank at about 3.05 or 3.10 pm and while waiting for them to leave the bank, he began to feel scared. At about 3.30 pm, when the two men left the bank, he saw Sek brandishing his pistol at them and announcing that it was a robbery. Sek then grabbed a big package which was being held by one of them and handed it to him and the both of them then ran out of the building by the same side-entrance towards Sek's motorcycle with several people in pursuit; he also heard people shouting that there had been a robbery. Sek then attempted to start the engine of the motorcycle but by then as several persons who were pursuing them were getting close, both he and Sek then ran towards a road junction which led to a one-way street. He was running behind Sek and while running, he took out the pistol and held it in his right hand as he felt he could run faster with the pistol in his hand as opposed to having it tucked at his waist; all the while the said package was held in his left hand.

Whilst running in the same direction as Sek, he was aware that somebody was chasing him and that people were shouting "perompak! perompak!" and to enable him to run faster, he threw away the said package. He then saw Sek stopping a taxi and getting into it which then sped away. He became frightened as he did not know where to run to and subsequently ran down a flight of steps leading to a car-park of a cinema but as he was about to throw the pistol underneath a car. SP9 caught up with him and held his hand. He denied that he pointed his pistol at PW9 and said that he could have shot PW9 at any time if he wanted to. He confirmed that PW9 held his pistol the way PW9 had demonstrated to the Court and admitted that both he and PW9 had struggled.

He stated that he did not want to release the pistol to PW9 during the struggle as he was afraid that PW9 was a detective who would shoot him with the pistol if he succeeded in getting hold of it. He however claimed that he never had the intention of shooting PW9 and that during the struggle his finger was outside the trigger guard of the pistol. He also claimed that it was PW9 who tugged at the trigger and confirmed that the pistol was discharged twice during the struggle and that the second discharge had hit his stomach.

During cross-examination, the accused stated that he did not know what were the occupations of Wong and Sek neither did he ever ask them about it. He stated that he stayed at the hotel for three days as he wanted to discuss with Wong about the sub-contract work that Wong promised him. He was willing to stay in the hotel for three days as Wong informed him that he could make a profit of about RM10,000. He however admitted that whilst they were together in the toilet in KOMTAR, Wong did not actually say that he will kill him if he did not participate. He also admitted that there was sufficient time for him to run away whilst they were waiting for the two persons to leave the bank but he did not do so as he was afraid that Wong would take revenge upon him. He denied that the pistol belonged to him and denied that he had brought it for the purpose of the robbery. He also denied that he had planned the robbery together with Wong and Sek. He insisted that the reason why he did not throw away the pistol whilst he was running was because he was afraid that some member of the public might pick it up.

A police officer, DW2, who was called by the defence gave evidence that both Wong and Sek were charged in the Sessions Court; Wong was charged with an offence of unlawful possession of firearms under s. 8 of the 1971 Act and an offence of unlawful possession of ammunition under s. 8(a) of the Arms Act 1960 whereas Sek was charged with an offence of consorting with persons carrying firearms under s. 9 of the 1971 Act. They both pleaded guilty and were sentenced accordingly.

At the close of the defence I found that the accused has failed to raise a reasonable doubt either as to the prosecution's case or as to his guilt and accordingly found him guilty on both charges. In his defence the accused did not deny that he participated in the robbery in KOMTAR. However, there is nothing to support his contention that he was coerced into taking part in the robbery - his only explanation was that he was afraid that Wong might shoot him if he refused but he admitted that Wong did not actually say that he will shoot him if he refused. Furthermore he has admitted that if he had wanted to back-out from participating in the robbery, he had ample time to do so when he and the others were waiting for the two men to leave the bank.

The accused has also admitted that he did resist being arrested by PW9 but insisted that he had done so as he thought the latter was a detective and that the latter might shoot him after wrestling the pistol from him. As to why PW9, assuming that he was a detective, would want to shoot him if he surrenders himself and hand over the pistol escapes me. The accused also claimed that he wanted to throw the pistol underneath a parked car when he was at the car-park but this was never raised by the defence when PW9 was being cross-examined if at all it forms part of the defence case. The only question of relevance which was put to PW9 by the defence and which was denied was that PW9 had tripped the accused when the latter was running down the steps leading to the car-park of the cinema. However, the accused never claimed in his defence that he was tripped by PW9 when he was running down the steps leading to the cinema's car-park.

Having considered the totality of the evidence, I do not consider the accused to be a witness of truth on his evidence which he gave in his defence and I cannot find any substance with regard to his claim that it was PW9 who tugged the trigger resulting in the discharge of the pistol or that the pistol was discharged accidentally. There was an overwhelming case against the accused and I find that he has failed to rebut the evidence of the prosecution and has failed to raise a reasonable doubt either as to the truth of the prosecution's case or as to his guilt and accordingly found the accused guilty as charged and I entered a conviction against him on both charges.

On the first charge under s. 3 of the Firearms (Increased Penalties) Act 1971 I imposed the death penalty which is the only punishment provided for such an offence and on the second charge under s. 8 of the Arms Act 1960, I sentenced the accused to three years imprisonment effective from the date of his arrest. In assessing the sentence on the second charge, I have taken into consideration all the circumstances before deciding on the sentence and I consider a 3 year imprisonment would be appropriate.